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Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF OF APPELLANTS.

HERBERT F. MOORE,
ARTHUR MEISEL,
JAMIESON, McCARDELL,
MOORE, PESKIN & SPICER,
A Professional Corporation,
19 Chancery Lane,
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Appellants.

JOHN R. PADOVA,
SOLO & PADOVA,
3rd Floor, Lewis Tower Building,
15th and Locust Streets,
Philadelphia, Penna. 19102
Special Legal Consultant to Appellant City of Philadelphia.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF OF APPELLANTS.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:1I-9, 10) unconstitutional is not reported (A6). The opinion

of the Superior Court of New Jersey, Chancery Division, in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711 (A14). The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975) (A32). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Brief. The opinion of the New Jersey Supreme Court, on remand from this Court, is published in the official reports as *City of Philadelphia v. State Dept. of Environ. Protec.*, 73 *N. J.* 562 (1977), and in the unofficial reports as *City of Philadelphia v. State*, 376 *A.* 2d 888 (N. J. Sup. Ct. 1977) (A62). Said opinion is cited as *Philadelphia v. New Jersey*, 73 *N. J.* 562 (1977) in the within Brief.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside two separate judgments of the New Jersey Supreme Court. The first judgment, which upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Commerce Clause grounds, was rendered on November 18, 1975 and entered on the same date. This Court noted probable jurisdiction over the appeal on April 5, 1976, 425 *U. S.* 910 (1976). Following oral argument, the judgment of the New Jersey Supreme Court was vacated and the case remanded "for reconsideration in light of the Resource Conservation and Recovery Act of 1976", *Philadelphia v. New Jersey*, — *U. S.* — (1977) (Slip sheet opinion, pp. 1-2) (A60). The second judgment, which was rendered and entered on June 20, 1977, upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Supremacy Clause grounds, and additionally "reaffirm[ed] the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above" (A74). A notice of appeal to the Supreme Court of the United States from both judgments was thereafter filed in the New Jersey Supreme Court on July 22, 1977 (A307).

The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is the interstate movement of solid or liquid waste for purposes of resource recovery, treatment or disposal "commerce" within the meaning of the Commerce Clause?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place and undue burden upon interstate commerce?

3. Is a state statute that prohibits persons from bringing solid and liquid waste into a state in conflict with a federal statute that (a) requires cooperation in the establishment of solid waste management plans for interstate regions, and (b) provides for the issuance of federal permits to owners and operators of hazardous waste treatment, storage or disposal facilities?

4. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard on the material issues of fact raised by their complaint prior to the final determination?

STATEMENT OF THE CASE.

This case challenges the constitutionality, on Commerce and Supremacy Clause grounds, of a statute which prohibits a person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." *P. L.* 1973, *c.* 363.

Legislative efforts to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State were first initiated seven and one half years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[1] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[2] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for the disposal of solid wastes originating in the State."

1. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

2. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[3]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, denominated the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State.[4] In his "statement" attached to the bill, the sponsor commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an un-

3. Information with respect to bills introduced in the New Jersey Legislature is available in the New Jersey Legislative Index.

4. Section 4 of the Act granted to the Commissioner of the Department of Environmental Protection the specific

> "power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State."
>
> *N. J. S. A.* 13:1I-4a

fortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[5] the President of the New Jersey Public Utilities Commission urged the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132, the Waste Control Act, passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the President of the New Jersey Public Utilities Commission was not accepted.

Upon signing the bill, the Governor issued a press release[6] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Two and one-half months later, on May 7, 1973, at a conference on waste management sponsored by the Tri-State Regional Planning Commission,[7] Grant F. Walton, Director of the Division of Environmental Quality, New

5. See footnote 2, *supra*.

6. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

7. Said Commission was formed by virtue of an interstate compact between the states of Connecticut, New Jersey and New York C. G. S. A. § 16-339 *et seq.*; N. J. S. A. 32:22B-1 *et seq.*; McK Unconsol. Laws § 830 *et seq.*

Jersey Department of Environmental Protection, made reference to the newly-enacted statute, saying:

> "I mentioned that New Jersey had just passed legislation to give us control over the material that comes in from out of state. . . ."
>
> • • •
>
> ". . . The great temptation would be just to prohibit all materials from coming into the state of New Jersey . . . *but we don't feel that is responsible or realistic.*"[8]

(Emphasis added)

The expressed temptation to prohibit was unquestionably motivated by political and not environmental concerns. In his prepared address at the Waste Management Conference, Mr. Walton readily acknowledged the environmental integrity of sanitary landfills and their potential for reclaiming ravaged lands for public recreational use: "The health hazard, water and air pollution and methane gas problems commonly associated with landfills," he said, "can be eliminated through the proper design and operation of the facility . . . Properly done, abandoned surface mines can become parks, playgrounds and golf courses of the future with little or no detriment to the environment."[9]

8. Presentation by Grant F. Walton published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, *p.* 101.

9. *Id.*, at 74.

An identical conclusion was expressed in the New Jersey Solid Waste Management Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm."
>
> • • •
>
> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area.
>
> • • •

Consistent with Mr. Walton's remarks no action was taken by the Commissioner of the Department of Environmental Protection to prohibit the incineration or landfill in New Jersey of solid waste collected outside the state.

Almost 8 months passed without further visible activity. Then on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release saying, in part:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey.
>
> • • •
>
> "[If a ban is not promptly imposed], the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up." [10]

9. (Cont'd.)

"The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards."

New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) pp. 2, 71 and 78.

10. The text of the entire press release reads as follows:

"I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Consistent with the October 19, 1973 directive from Acting Governor Beadleston, the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste in New Jersey,[11] *N. J. A. C.* 7:26-1.8 (proposed).

The New Jersey Department of Environmnetal Protection expressed the reasons for the proposed ban in para-

10. (Cont'd.)

ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

11. The text of the proposed rule read as follows:

7:26-1.8 Out of State Waste

–1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

–1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

graph IV of its "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A148). Not unexpectedly, references to public health and environmental quality were virtually non-existent. Rather, the reasons presented for the proposed administrative prohibition were: (1) to assure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[12]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[13]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[14] was surprisingly candid:

"A. Description of Bill's Effect—

> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"

• • •

"E. Departmental Comments—

> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."

• • •

(Emphasis added)

The "major difficulty" identified by the Department was competition for the purchase of landfill disposal space. Environmental considerations were noticable in their absence.

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to

12. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A85, 172).

More particularly in the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", the Department commented: "The failure on the part of our neighboring states to provide suitable disposal facilities of their own . . . *is increasing the cost of disposal for our own municipalities.*" (A125-126).

13. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

14. See footnote 2, *supra*.

David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A125-126), saying:

• • •

> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363, to become effective February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A82). Their simultaneous application for a temporary restraining order was supported, among other documents (A105, 108, 111, 118), by an affidavit of a licensed professional engineer (A115) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey." [15]

Based upon its conclusion that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division, issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A128). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [16]

15. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See *p.* 9 *supra*.

16. N. J. A. C. 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated, or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous, waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered

(A169). In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A131), which averred in pertinent part, as follows:

* * *

> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [N. J. A. C. 7:1-4]
>
> * * *
>
> . . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, *the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.*
>
> * * *
>
> The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.
>
> * * *
>
> . . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.
>
> In conclusion, *it is EPA policy that no* municipality or *State should take action to prevent the free flow of waste across* municipal or *state boundaries* provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices."
>
> (Emphasis added)

16. (Cont'd.)
with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."
A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A77.

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974.

On February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that a principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State (A96, 174). They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A86, 172).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the

engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A181-182), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[17] He also revealed that no effort had been made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A184, 187).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A188).[18] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A192-193), that summary judgment not be granted to appellants pending a hearing on the merits:

17. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

18. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact.

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A6) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A198), by which they appealed from the trial court's

grant of summary judgment to appellants, but not from the denial of their own motion for summary judgment.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A200). Said motion was denied by the Court on August 14, 1974 (A204).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[19] by order dated October 7, 1974 (A206). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution

19. In *Hackensack Meadowlands*, suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A32).

By its ruling, the New Jersey Supreme Court disposed, on the mertis, of a case concededly involving substantial disputed issues of material fact which had never been heard by the trial court.[20] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants' complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants' emergent motion for a stay of judgment and interim injunctive relief pending its further order (A212).

In an effort to remedy the aforesaid procedural impropriety, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A216). The trial court indicated that it would hold a plenary hearing within two weeks. In the alternative, appellants

20. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception, were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the New Jersey Rules of Court, the only question before the Supreme Court of New Jersey was whether the trial court correctly granted summary judgment to appellants.

sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the emergency stay that it had previously issued, effective December 31, 1975, and further

> "Ordered that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> Ordered that this Court does not retain jurisdiction." (A299).

Based upon this order, appellants were compelled, as a practical matter, to dismiss with prejudice every count in their complaint which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A300), the trial court

> "Further Ordered, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975 (A302). Thereafter, appellants duly filed a notice of appeal and a jurisdictional statement. Probable jurisdiction was noted on April 5, 1976, 425 *U. S.* 910 (1976).

On October 21, 1976, thirteen days before the scheduled date of oral argument, the President of the United States signed the Resource Conservation and Recovery Act of 1976, *Pub. Law* 94-580, 42 U. S. C. § 6901 *et seq.*, which amended comprehensively the Solid Waste Disposal Act, 42 U. S. C. § 3251 *et seq.*

At oral argument held on November 3, 1976, a question was posed by Mr. Justice White with respect to the effect of the aforesaid federal legislation on the matter before the Court. Appellants thereafter filed a motion seeking leave to submit a supplemental brief dealing with the effect of the Resource Conservation and Recovery Act of 1976 upon the validity of *P. L.* 1973, *c.* 363. Said motion was granted by order dated November 15, 1976 and supplemental briefs were filed simultaneously by both parties.

On February 23, 1977, a majority of the United States Supreme Court issued a *per curiam* opinion vacating the judgment of the New Jersey Supreme Court and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976, *Philadelphia v. New Jersey*, — *U. S.* — (1977) (Slip sheet opinion, pp. 1-2) (A59), saying, in pertinent part, as follows:

> "While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and

not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1977 pre-empts the New Jersey statute." [21]

On March 15, 1977, appellees moved the New Jersey Supreme Court for clarification or, in the alternative, ". . . for a stay of any lower court injunctive order which may be found presently to bar enforcement of Chapter 363 . . . ." (A320).[22] Appellees further moved for an expedited schedule in connection with the remand.[23]

By order dated April 4, 1977, the New Jersey Supreme Court granted appellees' motion for acceleration, but reserved decision on the application for a stay:

"This matter having been duly presented to the Court, it is . . . further

ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further

• • •

21. Mr. Justice Powell, speaking for four members of the Court, dissented commenting, "We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty."

22. On the date appellees' motion was filed, the United States Supreme Court—and not the New Jersey Supreme Court—still had jurisdiction of the appeal. Pursuant to Rule 59 of the Rules of the United States Supreme Court, jurisdiction remains vested in the Supreme Court until the issuance of its mandate, an event occurring 25 days after the issuance of its opinion.

23. The motion for acceleration was not opposed.

ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted." (A321).

Following oral argument, the New Jersey Supreme Court handed down its opinion on June 20, 1977, holding that *P. L.* 1973, *c.* 363 was not pre-empted, under the Supremacy Clause, by the Resource Conservation and Recovery Act of 1976 (A62). However, it stayed its judgment for a period of 30 days "to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment". *Philadelphia v. New Jersey*, 73 *N. J.* 562, 575 (1977) (A74).

Appellants duly filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on July 18, 1977 (A305). Thereafter, appellants filed a notice of appeal on July 22, 1977, and a jurisdictional statement on September 15, 1977. Probable jurisdiction was noted on November 28, 1977, — *U. S.* — (1977).

SUMMARY OF ARGUMENT.

Solid and liquid waste, the service of collecting, transporting, treating and disposing of same, and the sale of landfill space for the disposal of solid and liquid waste collected outside the state are recognized subjects of interstate commerce.

A statute which prohibits the entry of a subject of commerce, irrespective of condition or potential for harm, is directed against commerce and may not stand.

If a threat is caused to the public health and environmental quality by solid and liquid waste, or the process of treating, transporting and disposing of same, it is based upon the nature of the substance being regulated and not its place of origin. Regulation of such commerce must be accomplished in an evenhanded, nondiscriminatory manner.

The Court will decide for itself whether a statute represents a legitimate exercise of the state's police power, or whether it really amounts to a discriminatory regulation of interstate commerce and a direct burden thereon.

A police regulation which affects interstate commerce must not go beyond the necessities of the particular case. In light of the environmental integrity of properly designed and operated incinerators and sanitary landfills, there is no legitimate local public reason to prohibit entry, treatment or disposal of solid or liquid waste which originated or was collected in another state.

New Jersey has improperly attempted to secure an economic benefit for its residents, in contravention of the Commerce Clause of the United States Constitution, by adopting *P. L.* 1973, *c.* 363.

In addition, said statute must fall under the Supremacy Clause because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress contained in the Resource Conservation and Recovery Act of 1976.

At any event, in light of the many genuine issues of material fact, the New Jersey Supreme Court erred in upholding the constitutionality of *P. L.* 1973 *c.* 363 as not violative of the Commerce Clause absent a hearing, on the merits, before the trial court. Appellants were thereby denied due process of the law.

ARGUMENT.

A.

The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause.

In the proceedings before the New Jersey Courts, appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore are not within the purview of the Commerce Clause. This contention was rejected below, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 64 *N. J.* 451, 467 (1975), and is wholly unsupportable in law and in fact.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business." *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928); *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925); *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). This Court has consistently defined commerce in broad terms to include all commercial intercourse, including the component parts thereof, *Dahnke-Walker Co. v. Bondurant*, 257 *U. S.* 282, 290 (1921). Thus, the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972) and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle ranging across a state line, *Thorton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914) and telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882), have all been treated as commerce in a federal constitutional sense. See *U. S. v. Underwriters Assn.*, 322 *U. S.* 533, 549 (1944).

Not surprisingly, the proposition that solid waste collection and disposal is commerce has already been established by the federal courts.

In *United States v. Pennsylvania Refuse Removal Assn.*, 242 F. Supp. 794 (E. D. Pa. 1965), certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal." 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' argument that a worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce'* as used in the Act, United States v. Nat'l Ass'n of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n.*, 242 *F. Supp.*, *supra*, at 700 (Emphasis added).

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which

succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F. 2d* 806, 808 (3 Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).[24]

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is often a merchantable commodity.

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J.* Super. 160, 170 (Ch. Div. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, Judge (now Justice) Schreiber rejected appellees argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity." The New Jersey Supreme Court agreed, saying, ". . . certain types of solid waste may have legitimate market value for recycling or other purposes." *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467.

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary landfill facilities within the State (A123), and that certain communities and industries in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A186-187, 326-332). It is also established that the City of Yonkers, New York and Appellant City of Glen Cove have heretofore purchased disposal space in New Jersey from private solid waste disposal public utilities, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 476 (A55, 347). In addition

24. More recently, see *Mascaro & Sons, Inc. v. O'Hara, Inc.*, — *F. 2d* — (3 Cir. 1977), 1977-2 *Trade Cases*, ¶ 61,727.

automobile hulks, being a form of bulky waste, *N. J. A. C.* 7:26-1.43, regularly move in interstate commerce, *Alexandria Scrap Corporation v. Hughes*, 426 *U. S.* 794 (1976). Indeed, the House Report on the Resource Conservation and Recovery Act of 1976 candidly asserts "that most of our discarded materials have at some time entered the flow of interstate commerce."[25] It is part of the established course of business.

Governed by the aforesaid authorities, the interstate movement of solid waste for purposes of resource recovery, treatment or disposal unquestionably involves commercial intercourse.

Appellants' solid waste collection and disposal companies are New Jersey public utility corporations subject to regulatory control by the Board of Public Utility Commissioners, *N. J. S. A.* 48:2-13, *N. J. S. A.* 48:13A-1 *et seq.* Although a major component of their business activity is service, see *N. J. S. A.* 48:13A-2, they may also engage in the sale of methane gas, steam or other power-generating sources and recovered materials such as paper, glass, copper, steel, tin and aluminum (A351, 360).

In a very real sense, appellant solid waste disposal companies which operate sanitary landfills derive their principal business income from selling space for disposal purposes rather than from providing a service. The cost of operating sanitary landfills in an environmentally sound manner is enormous (A350, 366). Interestingly, the New Jersey Legislature, in the Solid Waste Management Act, *N. J. S. A.* 13:1E-1 *et seq.* felt compelled to observe:

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities and other solid

25. House Report No. 94-1491 accompanying HR 14496 (Comm. on Interstate and Foreign Commerce), at 9.

waste collectors to guarantee the flow of solid waste to such facilities."

N. J. S. A. 13:1E-2c

If prevented from obtaining sufficient minimum quantities of solid waste, the business of Kinsley's and of other appellant sanitary landfill owners will be greatly diminished or destroyed (A348-349, 366-367, 370, 373), *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8. This result would be particularly harsh and inequitable in the present case since expenditures for environmental controls approximating $500,000 have already been made at appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A366). The improvements would not have been made but for a long term contract with the City of Philadelphia (A366).

Appellant Landfill and Development Company is in a similar position (A350-351, 370). Unless *P. L.* 1973, *c.* 363 is struck down, it will lose approximately $700,000 in annual gross income (A369).

Moreover, if the interstate movement of solid waste for purposes of resource recovery, treatment or disposal is not commerce, then individual states can adopt repressive laws with impunity, thereby materially affecting channels of interstate commerce in solid waste.

Since probable jurisdiction was noted by this Court on April 5, 1976, a statute was passed by the Louisiana Legislature to proscribe the transportation of

> "any waste material which originated or was collected outside the territorial limits of the state into Louisiana with the intent to bury, store or otherwise dispose of such wastes in Louisiana until the office of health services and environmental quality of the Department of Health and Human Resources has determined that such action can be permitted without endangering the health, safety and welfare of any member of the public or animal life."

Prior to the adoption of said statute, seven states had adopted laws which, to varying degrees, prohibited the disposal of solid waste collected in another state.[26] Three other states imposed various regulatory limitations.[27]

If each state was free to pass such laws, commerce in solid waste collection and disposal services could be brought to a halt at state lines.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and dis-

26. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

27. Delaware, Illinois and Louisiana.

posal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. Absent controlling federal legislation, the Commerce Clause does not deprive the states of the power to regulate matters of legitimate local concern in areas where uniformity of regulation is not necessary, even when interstate commerce is, to some measure, regulated or affected thereby, *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 767 (1945).

However, in exercising its power, a state must be reasonable in its requirements, promote its objectives without discrimination, and not go beyond the necessities of the particular case, *Plumley v. Massachusetts*, 155 *U. S.* 461, 471 (1894), *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), *Savage v. Jones*, 225 *U. S.* 501, 525 (1912), *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937), *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), *Great A & P Tea Co. v. Cottrell*, 424 *U. S.* 366 (1976). As stated by Mr. Justice Clark in *Cities Service Co. v. Peerless Co.*, 340 *U. S.* 179, 186-187 (1950):

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of the state restrictions."

See also *Pike v. Bruce Church Inc.*, 397 *U. S.* 137, 142 (1970); *Hunt v. Washington State Apple Advertising Commission*, – *U. S.* – (1977).

In approaching Commerce Clause questions, this Court has consistently determined for itself whether a regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce, *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). Mr. Justice Reed emphasized the Court's responsibility in this area in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

> ". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The aforesaid principles are not new. They were applied in *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877) where this Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

> "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute,

> we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered . . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."
>
> *Rasmussen v. Idaho*, 181 *U. S. supra.* at 201 (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from

designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

> "We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."
>
> *Oreg.-Washington Co. v. Washington* 270 *U. S., supra,* at 96.

The New Jersey statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior* to exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra,* at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State

or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell*, 311 *U. S.* 454 (1940); *Head v. New Mexico Board*, 374 *U. S.* 424, 429 (1963).

A proscription against discrimination was similarly noted in the leading environmental case *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960), where an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> "... state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to any person, firm or corporation within the city, discriminates against interstate commerce as such. It *is a regulation of general application*, designed to better the health and welfare of the community . . . ." *Huron Cement Co. v. Detroit*, 362 *U. S., supra*, at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . , or unduly burdensome on* maritime activities or *interstate commerce. . . .*"
>
> *Huron Cement Co. v. Detroit*, 362 *U. S. supra*, at 443 (Citations omitted, emphasis added).

The Court in *Huron* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it would have been struck down.

Appellants respectfully contend that *P. L.* 1973, *c.* 363, while outwardly cloaked "in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.*, 431 *U. S.* 265, 285, n. 21 (1977), is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents, *H. P. Hood & Sons, Inc. v. DuMond*, 336 *U. S.* 525, 538 (1949).

The New Jersey Department of Environmental Protection explained the process this way:

> "In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban

on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collection of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. *This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburban and rural areas.*" (A123) (emphasis added)[28]

An identical sentiment was expressed by Acting Governor Beadleston who, on October 19, 1973, directed the Commissioner of the Department of Environmental Protection to initiate a ban upon the disposal in New Jersey of out-of-state garbage: ". . . the people of New Jersey," he said, "will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up", See p. 11, n. 10 *supra*. The record demonstrates overwhelmingly that the motivation for imposing the embargo was economic and not environmental.

Appellees admit that in enacting *P. L.* 1973, *c.* 363, a principal concern of the New Jersey Legislature was to preserve landfill areas in New Jersey for solid waste generated in the State (A96, 174). This it cannot constitutionally do.

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28. In *Mascaro & Sons, Inc. v. O'Hara, Inc.*, — *F. 2d* — (3 Cir. 1977), 1977-2 Trade Cases, ¶ 61,727, decided less than two months ago, the Third Circuit commented to the same effect:

> The haulers dump the refuse at a landfill location and pay the operator for the privilege. The amounts paid for transportation to the site and for landfill use are significant costs which affect the prices charged customers. In order to keep expenses low, haulers prefer to utilize landfills as close to the customers as is feasible.

In *Penna. v. West Virginia*, 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers."

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State*, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning back-

ward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr*, 255 *F. Supp.* 828 (W. D. Tex. 1966), aff'd 385 *U. S.* 35 (1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory against New Jersey in operation and effect (A374).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principal eloquently in *Baldwin v. G. A. F. Seelig*, 294 *U. S.* 511, 523 (1935). In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he observed:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews*, 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and is devoid of any legitimate local concern.

But even if, for the sake of argument, a legitimate local concern is found, that does not end the inquiry: "When discrimination against commerce . . . is demonstrated" said Mr. Chief Justice Burger less than 7 months ago, "the burden falls on the State to justify it both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission*, — *U. S.* — (1977), slip opinion at 18.

Appellees have argued that a prohibition against out-of-state solid waste will reduce volume and thereby preserve further acreage from use as disposal sites. There are two inherent fallacies with this reasoning. Firstly, sanitary landfills can be operated without any "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 *U. S. C.* § 6944. Secondly, *any* prospective use of land is subject to objection on the same grounds. For example, the erection and operation of a manufacturing plant or a school can be said to "forever ruin virgin land" and, if not properly regulated, to cause a threat to public health or environmental quality.

For the same reasons, appellees cannot justify the statute on account of the unavailability of nondiscriminatory alternatives. Less than nine months before *P. L.* 1973, *c.* 363 was introduced in the New Jersey Senate, the Waste Control Act was signed by the Governor, *N. J. S. A.* 13:1I1 *et seq.* Pursuant to Section 4 of that Act, the Commissioner of the New Jersey Department of Environmental Protection was granted express power to regulate and prohibit the incineration or landfill in New Jersey of solid

waste which originated or was collected outside the State, *N. J. S. A.* 13:1I-4a. Obviously, before Acting Governor Beadleston directed to the contrary, the Commissioner did not feel that a wholesale ban on interstate solid waste disposal was either necessary or desirable, see pp. 8-13 *supra*. More importantly, under the Waste Control Act, the Commissioner could impose a ban if other nondiscriminatory alternatives proved unsuccessful to protect the legitimate local interest of the State.

New Jersey has traditionally provided comprehensive regulatory controls to protect the health of its citizens and the quality of its environment. In 1958, the New Jersey Health Council adopted Chapter VIII-Refuse Disposal as part of the State Sanitary Code pursuant to authority conferred by *N. J. S. A.* 26:1A-7. Chapter VIII prohibited the operation of dumps and authorized the disposal of solid waste only through use of

> "(a) sanitary landfills established, conducted, operated and maintained in accordance with standards set forth in Regulation 4, 5, and 6 of this Chapter
>
> OR
>
> (b) Incinerators constructed, operated and maintained in accordance with Code or Regulation of the New Jersey Air Pollution Control Commission.
>
> (c) Other methods of disposal as may be approved by the State Department of Health."

The regulations collected in Chapter VIII-Refuse Disposal, were adopted, consistently with the mandate in *N. J. S. A.* 26:1A-7, ". . . to preserve and improve the public health in this State." [29]

29. *New Jersey State Sanitary Code* (Trenton: New Jersey State Department of Health, rev. September 1963) p. 1.

On April 13, 1970, the Public Health Council adopted a revision of Chapter VIII of the State Sanitary Code which substantially expanded the previously-existing regulations. The authorized methods of disposal were not changed or altered in any way, but additional operational requirements were imposed to further protect the public health. On April 22, 1970, the functions, powers and duties of the Public Health Council were transferred to and vested in the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection, *N. J. S. A.* 13:1D-7a. Chapter VIII of the State Sanitary Code was not repealed by the administrative reorganization; it remained in full force and effect, under the jurisdiction of the Department of Environmental Protection, *N. J. S. A.* 13:1D-15, 13:1E-66.

Approximately three months later, on July 31, 1970, the *New Jersey Solid Waste Management Plan* was published. Said Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey, reported with candor:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm.
>
> • • •
>
> "The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards." [30]

30. *New Jersey State Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at pp. 2 and 78.

Chapter VIII of the State Sanitary Code continued in effect until July 1, 1974, when it was superseded by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* In adopting said Rules, the Commissioner of the Department of Environmental Protection commented: "No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations."

The principal environmental engineer of the Bureau of Solid Waste management was more direct in his assessment of the Rules. During a deposition conducted on March 13, 1974, he grudgingly admitted that the Rules as then proposed were entirely adequate to protect the health, safety and welfare of the people of New Jersey and the quality of its environment (A181-182).

The Rules, which are extremely comprehensive in nature, provide that the exclusive methods by which solid waste may be disposed in New Jersey are through use of:

> "a. Sanitary landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.
>
> "b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.
>
> "c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter."
>
> *N. J. A. C.* 7:26-2.1.2

Dumps are expressly prohibited. *N. J. A. C.* 7:26-2.1.1.

No person may engage in the disposal of solid waste in New Jersey without having first obtained approval of a registration statement and engineering design from the Department of Environmental Protection. *N. J. A. C.* 7:26-2.2.2; 7:26-2.2.3. Designs for sanitary landfills, incinerators, and other methods of disposal must be prepared by a New Jersey licensed professional engineer and submitted to the Bureau of Solid Waste Management for its review, *N. J. A. C.* 7:26-2.4. In addition to other requirements, each engineering design for a sanitary landfill must include (a) a designation of the property or portion thereof for which approval is being sought; (b) contours and proposed final elevations; (c) proposed sequence of development; (d) soil borings; (e) soil classifications; (f) soil profile and aquifer information; (g) geological and ground water data; (h) identification of registered wells and public buildings within a one-half mile radius; (i) surface and subsurface drains; (j) leachate collection system, if applicable; (k) profile views for excavation, and grades and elevations for dikes, berms or other pollution protection devices or techniques; (1) proposed landscaping, beautification and screening techniques; (m) gas venting and monitoring system; (n) ground water monitoring wells; and (o) estimated capacity. *N. J. A. C.* 7:26-2.12.2.

Special emphasis is placed upon the control and elimination of ground and surface water pollution at sanitary landfill sites. To accomplish this objective *N. J. A. C.* 7:26-2.5.4 provides, in pertinent part:

> "No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or

> ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water."

In addition, *N. J. A. C.* 7:26-2.5.22 requires the installation of ground water monitoring systems as a condition precedent to the operation of a new sanitary landfill or the expansion of an existing facility:

> "No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information."

The Department of Environmental Protection can require the installation of an impermeable liner (A238), where necessary, to create a barrier between the deposited solid waste and exposed surfaces that would otherwise be unsatisfactory for land disposal purposes.

Gas venting systems must be installed at every existing sanitary landfill site, and at every new facility, as a condition of continued operation. In this connection, *N. J. A. C.* 7:26-2.5.21 provides:

> "New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined structures on or adjacent to the facility be permitted."

In addition to the aforesaid, a sanitary landfill must effectively control scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.5.6, dust, *N. J. A. C.* 7:26-2.5.7, odor, *N. J. A. C.* 7:26-2.5.8, and insects and rodents, *N. J. A. C.* 7:26-2.5.12. Other stringent and carefully conceived operational requirements, too numerous to mention, are also imposed by the Rules.

The situation with respect to the regulation of incineration is much the same. The construction and operation of incinerators for solid waste disposal is governed by both the Rules of the Bureau of Solid Waste Management, and by the Rules of the Bureau of Air Pollution Control, *N. J. A. C.* 7:27-11.1 *et seq.*

No person may construct a new incinerator, or use a new or altered incinerator, unless a "Permit to Construct, Install or Alter Control Apparatus or Equipment" and a "Certificate to Operate Control Apparatus or Equipment" have first been obtained from the Bureau of Air Pollution

Control, Department of Environmental Protection, *N. J. A. C.* 7:27-11.4. In order to assure that incinerators and control equipment will not pollute the air,

> "The Department may require such details regarding the equipment or control apparatus as it considers necessary to determine that the equipment or control apparatus is designed to operate without causing a violation of any provisions of the New Jersey Air Pollution Control Act or any provisions of codes, rules or regulations promulgated hereunder. . . ."
>
> *N. J. A. C.* 7:27-8.4(b)

The Rules of the Bureau of Air Pouultion Control contain specific emission standards with respect to particles emission, smoke emission, unburned waste or ash emission, and odor emission, *N. J. A. C.* 7:27-11.4. Most importantly, an incinerator cannot be constructed or used unless it is ". . . effective for the purpose of air pollution control". *N. J. A. C.* 7:27-11.2. See also *N. J. A. C.* 7:27-5.2(a) being a regulation of general applicability which prohibits the emission into the outdoor atmosphere of substances in quantities which shall result in air pollution. Open burning is specifically prohibited, *N. J. A. C.* 7:27-2.3.

An incinerator cannot be used for solid waste disposal purposes until an engineering design prepared by a New Jersey licensed professional engineer has been filed with and approved by the Bureau of Solid Waste Management. Such design must contain information with respect to (a) rated capacity, (b) current and anticipated daily loadings, (c) unloading and storage facilities, (d) emergency storage facilities, (e) alternate unloading locations, (f) rodent

and odor control techniques, (g) daily residue tonnage, (h) disposal location residue, and (i) accompanying recycling or reclamation activity, if any. *N. J. A. C.* 7:26-2.12.3.

The Rules regulate the operation as well as the design of incinerator facilities. Areas where putrescible waste is stored or deposited must be cleaned within each twenty-four hour period, and no such waste may be stored longer than twenty-four hours without acceptable treatment to prevent putrefaction. *N. J. A. C.* 7:26-2.11.1; 7:26-2.11.2. A program to control the scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.11.3, dust, *N. J. A. C.* 7:26-2.11.4, odors, *N. J. A. C.* 7:26-2.11.5, and insects and rodents, *N. J. A. C.* 7:26-2.11.8 must be implemented at each facility.

The New Jersey Department of Environmental Protection is not the only state administrative agency authorized to supervise the operation of solid waste facilities. Regulatory control is independently conferred upon, and may be exercised by, the Board of Public Utility Commissioners. *N. J. S. A.* 48:2-23 provides as follows:

> "The board may, after hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and to maintain its property and equipment in such condition as to enable it to do so."

The fact that there is no existing substantial or unreasonable threat to public health or environmental quality,

and that there is a reasonable, nondiscriminatory alternative to exclusion, is further independently confirmed by applicable provisions of the Resource Conservation and Recovery Act of 1976, 42 *U. S. C.* § 6901 *et seq.* Pursuant to the terms of said Act, the Administrator of the United States Environmental Protection Agency is directed to establish criteria for determining which facilities may be classified as sanitary landfills, and which will be classified as open dumps. The criteria must, at a minimum, eliminate any reasonable chance of adverse effects on health or the environment from land disposal:

> "Not later than one year after the date of enactment of this section, . . . the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps . . . . At a minimum, such criteria shall provide that a *facility may be classified as a sanitary landfill* and not an open dump *only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.*"
>
> 42 *U. S. C.* § 6944
> (Emphasis added)

Sanitary landfills are not treated as a mere alternative to other forms of disposal; they are viewed as the principal disposal source. In describing the most effective approach for dealing with discarded materials, the Committee on Interstate and Foreign Commerce, United States House of Representatives, commented:

> "The Committee recognizes that the most effective approach for alleviating the problems created by discarded materials is a comprehensive discarded materials management approach. Such an approach includes the use of techniques to recover the greatest amount of energy and materials possible from the discarded materials, reduce waste residuals to a minimum, and *provide for an environmentally sound disposal of the remainder, principally through sanitary landfill.*"[31]

Congress was familiar with the problems typically associated with land disposal. It recognized that the improper disposal of wastes may present a danger to public health and environmental quality, 42 *U. S. C.* § 6901 (b)(2), but it also understood that "the effects on human health and the environment from real sanitary landfill should be slight." [32]

Although countless opportunities were presented, appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste is such that it will always spread pestilence and disease. Quite to the contrary, appellees have admitted that properly designed and regulated sanitary landfills can be operated with no reasonable likelihood of harm to the public or to the environment (A181-182). This admission is in total harmony with other judicial and scholarly authorities.

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31. House Report No. 94-1491 accompanying H. R. 14496 (Comm. on Interstate and Foreign Commerce), at 32 (Emphasis added).

32. Id., at 37.

In *Horn v. Community Refuse Disposal, Inc.*, 186 *Neb.* 43, 180 *N. W.* 2d 691 (Sup. Ct. 1970), plaintiffs brought an action to enjoin the establishment and operation of a sanitary landfill. The court denied the application saying:

> "The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground waters, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result."
>
> *Horn v. Community Refuse Disposal*, 180 *N. W.* 2d, *supra*, at 692.

The overwhelmingly accepted rule is that incinerators and sanitary landfills which are properly maintained and operated are not public nuisances; *Wood v. Town of Wilton*, 156 *Conn.* 304, 240 *A.* 2d 904 (Sup. Ct. 1968); *Rocchi v. Zoning Bd. of App. Town of Glastonbury*, 157 *Conn.* 106, 248 *A.* 2d 922 (Sup. Ct. 1968); *Myers v. City of Hagerstown*, 214 *Md.* 312, 135 *A.* 2d 147 (Ct. App. 1957) (and cases therein cited); Annotation, *"Public Dump as Nuisance"*, 52 *ALR* 2d 1134.

All too often, the words "sanitary landfill" and "dump" are confused with one another.[33] They are very different

33. See *Municipal Refuse Disposal*, 3rd ed. (Chicago: Public Administration Service, 1970), pg. 93, wherein it is stated:

> Although the sanitary landfill as a method of refuse disposal was given a clean bill of health many years ago, its acceptance by the public is still far from unanimous. The public has too often heard the terms "landfill", "dump", and "sanitary landfill" used interchangeably and does not understand the difference between a sanitary landfill and a landfill or dump. Unfortunately there are too many

entities.[34] The Rules of the Bureau of Solid Waste Management define a sanitary landfill as:

> "The land disposal site employing an *engineered method of disposal* of solid waste *in a manner that minimizes environmental hazards*, including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequest basis."
>
> *N. J. A. C.* 7:26-1.4.54 (Emphasis added)

33. (Cont'd.)

disposal facilities labeled "sanitary landfills" which are glaringly deficient in some of the essential elements. The 1968 National Survey shows that 94 per cent of all landfill refuse disposal projects fall short of complying with all criteria for fully acceptable operations. The resulting public image of sanitary landfills has been damaging.

A well-located, well-designed, and efficiently operated sanitary landfill meets public health standards and requirements for control of air and water pollution, fire, and nuisances:

1. Vector breeding or sustenance is prevented by eliminating harborage and food supply for rats, flies, and other vermin.

2. Air pollution by dust, smoke, and odor is controlled.

3. Fire hazards are controlled during operational phases. (They are negligible in a completed fill.)

4. Pollution or surface and ground waters is precluded.

5. All nuisance factors are effectively controlled; i.e., the system is aesthetically acceptable and noise is kept to a minimum.

34. Pictorial illustrations of a "sanitary landfill" and a "dump" appear on the sheet facing page 58.

A dump, on the other hand, is separately defined as:

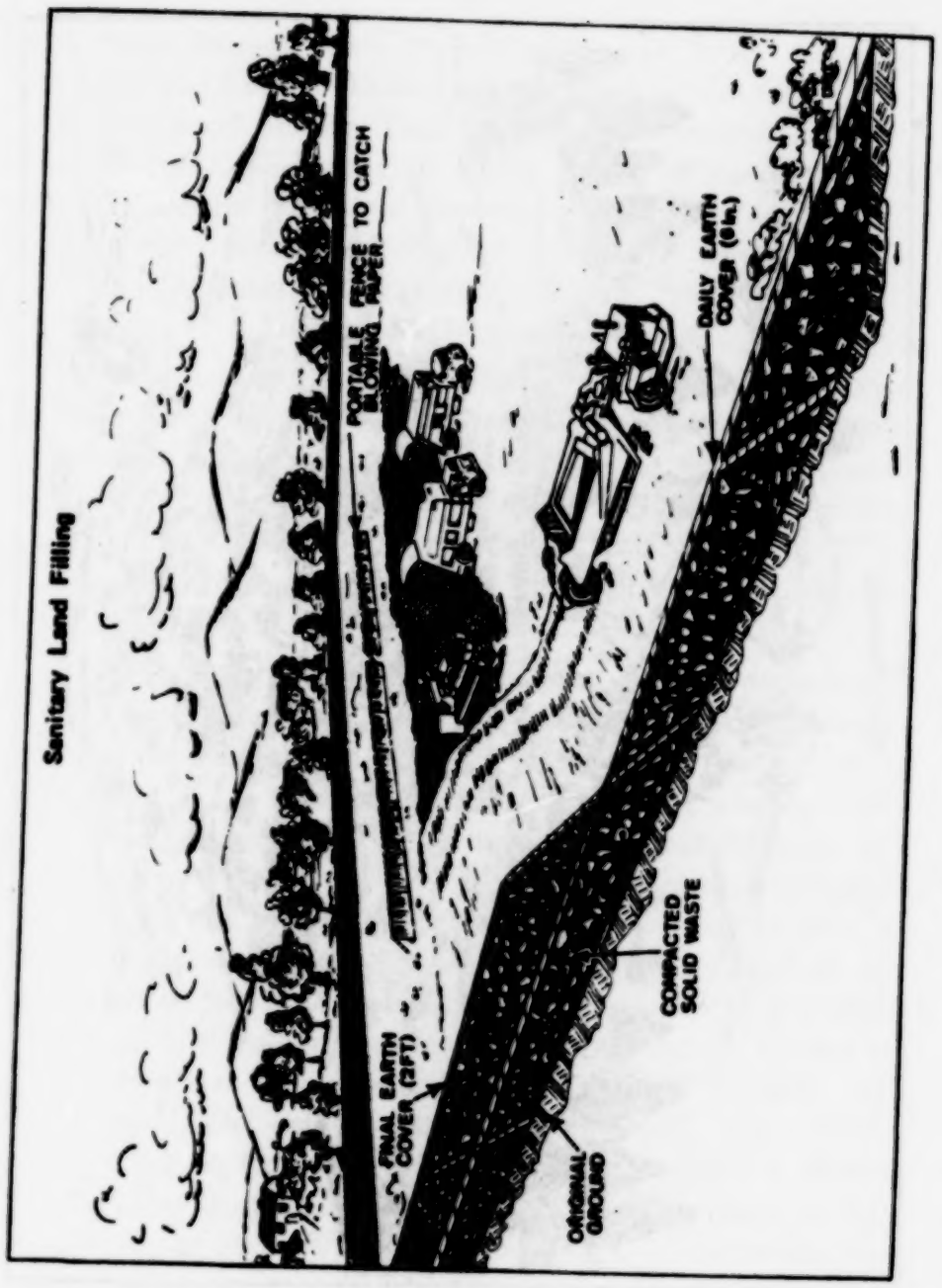
> "A land site at which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers."
>
> *N. J. A. C.* 7:26-1.4.23.

When dumps were determined to be hazardous to human health, their operation was entirely prohibited in the State of New Jersey, *N. J. A. C.* 7:26-2.1.1. No distinction was made between dumps which accepted for disposal solid waste collected within New Jersey and those which accepted waste collected outside the State. The regulation acted in a non-discriminatory, even-handed manner in addressing a legitimate public problem. It was the method of disposal which posed a substantial threat to public health and environmental quality, *not* the substances disposed of or the place of their origin.

Environmental hazards are minimized by the sanitary landfill disposal method, and by incineration, due to the emphasis placed upon design and sanitary operation. Origin of wastes is not related to these criteria. The degree to which a disposal mode presents a threat to public health and environmental quality is entirely within the regulatory control of the State.

Interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce, which should not be disturbed.



supra, at 363-365; *Swift & Co. v. Wickham,* 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U. S. 111 (1965), aff'd 364 F. 2d 241 (CA 1 1966), cert. denied, 385 U. S. 1036 (1967)."

Jones v. Rath Packing Co., 430 *U. S., supra,* at 525-526.

Appellants respectfully submit that *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz,* 312 *U. S.* 52, 67 (1940).

The procedure for applying the *Jones* test to Supremacy Clause questions was set forth several years ago by Mr. Justice White in *Perez v. Campbell,* 402 *U. S.* 637, 644 (1971) as follows:

"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

P. L. 1973, *c.* 363 has already been construed by the New Jersey Supreme Court: it prohibits any person from bringing into New Jersey any solid or liquid waste which originated or was collected outside the State, except garbage to be fed to swine, until permitted and regulated by the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "Commissioner"), *Hackensack Meadowlands v. Mun. Landfill Auth.,* 68 *N. J.* 451, 468 (1975).

The Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA") has not yet been construed. However, its expressed direction in relation to hazardous waste management and to interstate solid waste management is clear and unambiguous.

Hazardous Waste Management.

Not later than 18 months after the date of enactment of Sections 3003, 3004 and 3005 of RCRA, 42 *U. S. C.* §§ 6923, 6924 and 6925, the Administrator of the United States Environmental Protection Agency (hereinafter "Administrator") must promulgate regulations (a) establishing standards, applicable to transporters of hazardous waste, as may be necessary to protect human health and the environment, (b) establishing standards, applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste as may be necessary to protect human health and the environment, and (c) requiring each person owning or operating a facility for hazardous waste treatment, storage or disposal to secure a permit for such facilities. The Administrator, or a State, if applicable, cannot issue a permit unless a facility complies with applicable requirements of RCRA, 42 *U. S. C.* § 6925(c); and proposed disposal sites must be separately listed in permit applications, 42 *U. S. C.* § 6925(b).

Although a state may develope its own hazardous waste program, 42 *U. S. C.* § 6926, it is specifically prohibited, with certain exceptions not material here, from imposing any requirements less stringent than those adopted by the Administrator, 42 *U. S. C.* § 6929.

The Congressional approach to hazardous waste management is particularly significant for two reasons. Firstly, since federal—and state—regulatory controls must, at a minimum, be protective of "human health and the en-

vironment", 42 *U. S. C.* §§ 6922, 6923, 6924 and 6929, then *a fortiori*, a state can adequately protect its vital land resources by something less than total exclusion. Secondly, a federal permit issued to a person owning or operating a facility for the treatment, storage or disposal of hazardous waste pursuant to 42 *U. S. C.* § 6925 "must be understood to be what it purports to be, a legislative authorization" to treat, store or dispose of hazardous waste regardless of its point of origin, *Gibbons v. Ogden*, 22 *U. S.* 1, 214 (1824).[35]

The effect of restrictive state legislation upon federal licensees was recently reviewed in *Douglas v. Seacoast Products, Inc.*, 431 *U. S.* 265 (1977). Speaking for seven members of the Court in striking down a Virginia statute which, in effect, prohibited non-residents of Virginia from catching menhaden in the Virginia portion of the Chesapeake Bay, Mr. Justice Marshall declared:

> "A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fisherman eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishing beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent."
>
> *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*, at 285-286.

35. In the context of the present litigation, the evident purpose of a federal permit to operate a hazardous waste disposal facility is to confer upon the holder the right to engage in the activity which gives the permit its real value, namely acceptance from any source of hazardous waste for storage, treatment or disposal, *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*.

While a state may impose reasonable conservation regulations to protect its vital resources, such measures must be designed to effectuate a legitimate local public interest in an evenhanded manner, *Huron Cement Co. v. Detroit*, 362 *U. S.*, *supra* at 443; *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*, at 278. This New Jersey has not done.

Despite its unquestioned power to adopt reasonable nondiscriminatory regulations, New Jersey chose the politics of exclusion when other non-restrictive alternatives were both suitable and adequate.

Nothing demonstrates this better than the State's approach to hazardous waste management.

Less than 1 year ago, the New Jersey Legislature approved a supplement to the Solid Waste Management Act (1970) governing the disposal of hazardous waste, chemical waste, bulk liquids and pesticides in the ground, *N. J. S. A.* 13:1E-38 *et seq*. Section 5 of said supplement provides, in pertinent part, as follows:

> "After March 15, 1980, no solid waste facility shall accept or receive for disposal, any hazardous waste, chemical waste, bulk liquid or pesticide unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environment protection] for the entire system."
>
> *N. J. S. A.* 13:1E-42.

Not surprisingly, the Assembly Energy and Natural Resources Committee which reviewed the Act prior to its passage, discounted good-intentioned concerns about environmental degradation, saying:

> ". . . As originally introduced, this bill would have prohibited any solid waste facility located within . . . 2 miles of a major aquifer, from accepting such solid waste for disposal. The Senate Energy and Environment Committee changed the '2-mile' limitation to '1,000 yards.'
>
> The Assembly Energy and Natural Resources Committee saw much merit in the sponsor's intentions, but felt that *the prohibition of disposal within 1,000 yards of a major aquifer* was too stringent and *would*, unintentionally, *prevent the location of such solid waste disposal facilities where they would present no danger to the public health and safety. . . .*"
>
> Assembly Energy and Natural Resources Committee Statement to S. 1493 dated August 2, 1976. (Emphasis added)

The position of the Assembly Committee was adopted by the New Jersey legislature. The bill, as enacted, permits the disposal of hazardous wastes and pesticides in all sanitary landfill facilities—even those located in or near major aquifers—provided a system for the interception, collection and treatment of leachate generated at the facility has been approved by the Department of Environmental Protection and installed at the site.

Since hazardous waste can be discarded in a properly designed, operated and regulated disposal facility with no reasonable prospect of harm to public health or to environmental quality, then there is no legitimate local public interest to be effectuated by the unlimited exclusion from New Jersey of out-of-state hazardous waste. That being the case, *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause for improperly limiting the full use and enjoyment of privileges inhering in a federal permit.

Interstate Solid Waste Management.

There is a second, equally compelling, Supremacy Clause problem with *P. L.* 1973, *c.* 363 which necessitates its invalidity: the statute stands as an obstacle to the establishment of solid waste management plans for interstate regions.

Pursuant to Section 4002 of RCRA, the Administrator must issue guidelines that identify areas "which have common solid waste management problems and are appropriate units for planning regional solid waste management services" within 180 days after the section's enactment, 42 *U. S. C.* § 6942(a). In the event an area identified by the Administrator is in two or more states, the respective Governors are specifically required by federal law to consult, cooperate and fix the precise boundaries of the region, 42 *U. S. C.* § 6946(c)(1). Once the boundaries have been established appropriate elected officials of general purpose units of local government must establish or designate an agency to develop a plan for the region, 42 *U. S. C.* § 6946(c)(2). It is essential to note that the public officials referred to in the federal Act have no dis-

cretion in the matter. Congress has mandated that they "shall" take the designated action.[36]

Consistent with the directive contained in 42 *U. S. C.* § 6942, on May 16, 1977, the Administrator promulgated Interim Guidelines for the Identification of Regions and Agencies for Solid Waste Management, 40 *CFR* § 255. Among the criteria listed for identifying regions are "Geographical areas which have a history of cooperating to solve problems in environmental or other related matters", 40 *CFR* § 255.10(a). Preliminary identification of regions is to be made by the Govenor or his or her representative, 40 *CFR* § 255.20, taking into consideration the published criteria for identifying regions, 40 *CFR* § 255.10, as well as the boundaries of Standard Metropolitan Statistical Areas (hereinafter "SMSA"), 40 *CFR* § 255.24(c). Once a Governor recommends the identification of an interstate region, concerned officials in the entire recommended region must be consulted, 40 *CFR* § 255.24.

Significantly, New Jersey and Pennsylvania have a history of cooperating to solve environmental and other problems. In 1966, the two States established the Delaware Valley Urban Area Compact for the coordination of regional planning in the compact area, *N. J. S. A.* 32:27-1 et seq., 73 *P. S.* § 701. Said area specifically included the counties of Burlington, Camden, Gloucester and Mercer in the State of New Jersey, and the counties of Bucks, Chester, Delaware and Montgomery and the City of Philadelphia in the Commonwealth of Pennsylvania, *N. J. S. A.* 32:27-2(b).

The Delaware Valley Regional Planning Commission, which was created by the Compact, quickly identified

36. Suits to enforce any requirement which has become effective pursuant to the Resource Conservation and Recovery Act of 1976 may be brought by any person, 42 *U. S. C.* § 6972(a).

solid waste planning as one of its statutory responsibilities. In 1969, the agency commissioned a 6 volume Regional Solid Waste Management Study for the subject area,[37] as part of its recognized planning function.

Furthermore, the Philadelphia SMSA includes, with the single exception of Mercer County, the very same counties and city participating in the Delaware Valley Urban Area Compact; and that is coterminus with one of the geographical areas involved in this litigation.

New Jersey has also entered into a compact with the States of Connecticut and New York, *N. J. S. A.* 32:22B-1 *et seq.*, *C. G. S. A.* § 16-339 *et seq.*, *McK Unconsol. Laws* § 830 *et seq.* Not unexpectedly, solid waste management planning falls within the ambit of the compact, see p. 8 *supra*.

It is difficult to conceive how an interstate solid waste management plan can be developed when a participating state prohibits the entry within its borders of solid or liquid waste which originates or is collected outside the territorial limits of the state. A plan cannot be developed and implemented between unwilling participants.

In *Perez v. Campbell*, 402 *U. S.*, *supra*, at 652, the United States Supreme Court re-emphasized the controlling principle "that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states are free to prohibit the entry of solid waste originating in other states.

37. *Regional Solid Waste Management Study Design Materials*, 6 vols. (Philadelphia: University of Pennsylvania, Fels Institute of Local and State Government, 1969) (typewritten manuscripts).

While it is true that the Committee on Interstate and Foreign Commerce, U. S. House of Representatives, in its report on H. R. 14496, commented: "At this time federal preemption of this [discarded materials] problem is undesirable, inefficient, and damaging to local initiative," p. 33, that remark was directed to the overall "discarded materials problem", and not to the relationship of specific state legislation with particular provisions in RCRA. Congress had no intention, either express or implied, to bar concurrent state legislation in the discarded materials area, but it also did not intend to sanction state enactments which would frustrate "any part of the purpose of the federal legislation." *Colorado Comm'n v. Continental*, 372 *U. S.* 714, 724 (1963).

Eleven states have already adopted laws which by their express terms, in varying degrees, directly affect the movement of solid waste in interstate commerce, see pp. 32-33, *supra*. Even if these laws are not in actual conflict with RCRA (which appellants do not concede) they establish an unmistakable potential for conflict, *City of Burbank v. Lockheed Air Terminal*, 411 *U. S.* 624 (1973), *Jones v. Rath Packing Co.*, 430 *U. S.* 519 (1977). This they may not constitutionally do under the Supremacy Clause.

D.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants' motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They, like appellees, acknowledged the existence of other issues upon which summary judgment could not be granted (A191, 192-193).

The trial judge's opinion reveals his determination as a matter of federal constitutional law (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that

P. L. 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A198) appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented

a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result lacked fundamental fairness. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A192-193):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on

the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.* 363 was not being attacked on Commerce Clause grounds alone.[38]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A299). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that *P. L.* 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment ini-

38. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

tially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

As a practical consequence of this action,[39] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean*, 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.*, 339 *U.S.* 306 (1950).

39. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who twice stayed the mandate of the New Jersey Supreme Court.

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination. *Rhodes v. Houston,* 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S., supra,* at 678. It was asserted a second time less than two weeks later in a motion addressed to the New Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A300),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

CONCLUSION.

The New Jersey Supreme Court has decided issues of national importance in a way not in accord with the decisions of this Court. It has also so far departed from the accepted and usual courses of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

HERBERT F. MOORE,
ARTHUR MEISEL,
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER,
A Professional Corporation,
Attorneys for Appellants.